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No. 99-1583

Supreme Court, U.S.
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In The

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

D.M.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION OF WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Was the Opinion of the Pennsylvania Supreme Court in *In re D.M.* based on a bona fide separate, adequate and independent state ground, namely, Article I, § 8 of the Pennsylvania Constitution, so that the United States Supreme Court should not undertake to review that Opinion?

B. Did the Pennsylvania Supreme Court properly hold that the police violated Respondent's rights under Article I, § 8 of the Pennsylvania Constitution and the Fourth Amendment by initiating an investigatory stop based on an anonymous tip of a man "**possibly** with a gun"?

C. Did the Pennsylvania Supreme Court properly hold that, under Article I, § 8 of the Pennsylvania Constitution and the Fourth Amendment, flight added no legal justification to the police investigation of a suspect where the officers acted on the basis of an anonymous tip of a man "**possibly** with a gun" and the flight occurred only after the police had initiated a seizure?

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OPINIONS BELOW

The decision of the Pennsylvania Supreme Court, published at *In re D.M.*, ___ Pa. ___, 743 A.2d 422 (1999), appears on Appendix 1-16 of the Petition for Writ of Certiorari. The unpublished Opinions of the Superior and trial courts appear as Appendices 18-31 and 32-35, respectively, of the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment of the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, § 8 of the Pennsylvania Constitution states as follows:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to be the affiant.

STATEMENT OF THE CASE

On June 24, 1996, at approximately 6 p.m., a Philadelphia police officer on routine patrol received a radio call to investigate a male "possibly with a handgun." The male was described as a black male wearing a white t-shirt, blue jeans, white sneakers. Within seconds, the officer arrived at the indicated location and saw Respondent, the only male on that corner, wearing a white shirt and blue jeans.

When the uniformed officer got out of his car, he told Respondent to "come here." At that, Respondent ran and the officer chased him. Another officer joined the pursuit, and Respondent stopped between the two officers. One officer told Respondent to put his hands up in the air and place them on the police car directly in front of him. The officer frisked Respondent for the officers' safety and felt a handgun in his crotch. Respondent was arrested and charged with violating Pennsylvania's Uniform Firearms Act.

On October 2, 1996, the trial judge denied a motion to suppress the gun, found Respondent guilty and delinquent, and placed him on intensive probation. Respondent filed an appeal in the Pennsylvania Superior Court, challenging the denial of the motion to suppress as contrary to Article I, § 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution. On November 19, 1997, in a memorandum opinion, that Court affirmed. Respondent filed an Application for Reargument *En Banc* or, in the Alternative, Reconsideration, which the Superior Court, in a *per curiam* order, denied on January 30, 1998. On February 9, 1998,

Respondent filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. On July 8, 1998, the Pennsylvania Supreme Court granted the Petition for Allowance of Appeal, limited to the issue of "whether reasonable suspicion existed to conduct a lawful stop pursuant to the Fourth Amendment of the United States Constitution and Article I, § 8 of the Pennsylvania State Constitution." On December 27, 1999, the Pennsylvania Supreme Court reversed Respondent's adjudication, finding that the search and seizure had violated Article I, § 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution.

On March 27, 2000, the District Attorney of Philadelphia County, Pennsylvania filed a Petition for Writ of Certiorari from the December 27, 1999, decision of the Pennsylvania Supreme Court in *In re D.M.*, ___ Pa. ___, 743 A.2d 422 (1999), citing to 28 U.S.C. § 1257(a). The petition was docketed on March 27, 2000. Respondent's Brief in Opposition is filed within thirty days of March 27, 2000, pursuant to Supreme Court Rule 15.3.

REASONS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

A. Because the Opinion of the Pennsylvania Supreme Court in *In re D.M.* is based on a bona fide separate, adequate and independent state ground, namely, Article I, § 8 of the Pennsylvania Constitution, the United States Supreme Court should not undertake to review that Opinion.

As the Opinion of the Pennsylvania Supreme Court in *In re D.M.* is grounded on Article I, § 8 of the Pennsylvania

Constitution, the United States Supreme Court should not undertake to review that Opinion.

The Pennsylvania Supreme Court has said that "the inquiry [in *Terry* cases] is the same under either Article I, § 8 . . . or the Fourth Amendment." *D.M.*, 743 A.2d at 425. Although the test itself – did the police possess reasonable suspicion at the initiation of their investigation? – is congruent, the Pennsylvania Supreme Court has frequently found seizures unconstitutional under Article I, § 8, where this Court has, in similar circumstances, found no seizure, as in the Pennsylvania Supreme Court's "forced abandonment" and "man with gun" decisions, discussed below.

" 'It is fundamental that state courts be left free and unfettered . . . in interpreting their state constitutions.' " *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S. Ct. 3469, 3476 (1983) (*quoting Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)). In interpreting the rights of citizens under the state constitution, the Pennsylvania Supreme Court has developed an independent state constitutional jurisprudence under Article I, § 8, the state counterpart to the Fourth Amendment. *See Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991); *see also Commonwealth v. Jackson*, 548 Pa. 484, 698 A.2d 571 (1996); *Commonwealth v. Hawkins*, 547 Pa. 652, 692 A.2d 1068, 1071 (1997) ("the public will receive its full measure of protection by police who act within the restraints imposed on them by Art. I, § 8 of the [Pennsylvania] Constitution and this court's relevant caselaw"); *Commonwealth v. Kue*, 547 Pa. 668, 692 A.2d 1076 (1997) (same, citing *Hawkins*, decided the same day).

As Petitioner notes, the critical question in the instant case is whether the anonymous tip of a "man possibly with a gun" established reasonable suspicion to justify an investigatory stop under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The Pennsylvania Supreme Court's decision, resting upon separate, independent state grounds, located here in Article I, § 8 of the Pennsylvania Constitution, is consistent with that Court's state constitutional jurisprudence.

In answering the question, the Pennsylvania Supreme Court discussed two precedents, *Commonwealth v. Jackson*, 548 Pa. 484, 698 A.2d 571 (1997), and *Commonwealth v. Cook*, 558 Pa. 50, 735 A.2d 673 (1999), both of which are based on Article I, § 8 of the Pennsylvania Constitution. The Court also referred to another decision, *Commonwealth v. Hawkins*, 547 Pa. 652, 692 A.2d 1068 (1997), which is also an Article I, § 8 case. Thus, the Pennsylvania Supreme Court's analysis of the facts and relevant legal principles relied principally upon state constitutional grounds.[1]

In addition, the Pennsylvania Supreme Court's disposition of the flight issue, discussed more fully below, is consistent with, and a logical outcome of, its "forced abandonment" decisions, a claim this Court has rejected under the Fourth Amendment but which retains its vitality under Article I, § 8 of the Pennsylvania Constitution.

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[1] Petitioner misstates the case by asserting that the Court "held that the officers violated the Fourth Amendment." Commonwealth's Petition at p. 5. It is revealing that Petitioner cites to no source in the Court's Opinion, for nowhere did the Court limit its holding to the Fourth Amendment.

Commonwealth v. Matos, 543 Pa. 449, 457, 672 A.2d 769, 773 (1996) (rejecting *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991), Court held abandonment coerced by unjustified police pursuit; thus, under Article I, § 8, evidence must be suppressed).

In *Matos*, the Court rejected this Court's holding in *Hodari D.* and held that, "due to the heightened privacy considerations in Pennsylvania, a police officer's pursuit of a person fleeing the officer was a seizure for purposes of Article I, § 8 of the Pennsylvania Constitution." *Cook*, 558 Pa. at 55, 735 A.2d at 675. In the three cases consolidated for appeal in *Matos*, the Court distinguished "mere encounters" and "coercive stops," and held that, under the Pennsylvania Constitution, pursuit by police constitutes a "seizure" that must be justified by the information available to the police at the outset of the chase. At the heart of the Court's decision was its statement that "the law of this Commonwealth has always maintained a strong preference for the rights of the individual in the face of coercive state action." *Matos*, 543 Pa. at 457, 672 A.2d at 773.

Under *Matos*, flight precipitated by unjustified police conduct adds nothing to the determination of reasonable suspicion because it occurs only after the police have initiated a seizure without reasonable suspicion. In *D.M.*, the Court found this distinction between federal and Pennsylvania analyses to be critical: where police approaching a suspect to investigate an anonymous tip of a man "possibly" with a gun observed no suspicious conduct prior to the suspect's flight, their pursuit elevated the situation into a seizure under Article I, § 8, without reasonable suspicion. Thus, under Pennsylvania state law, the flight here occurred only after the seizure

had been initiated, and accordingly, again under state law, could not justify the seizure.

In *Commonwealth v. Jackson*, 548 Pa. 484, 698 A.2d 571 (1996), the Article I, § 8 reasonable suspicion precedent that the Court found controlling in *D.M.*, the Court held that contraband had been uncovered by the police through forced abandonment, a position that, in *Hodari D.*, this Court had rejected five years earlier as a matter of federal law. *Jackson*, which relied on *Matos*, was clearly decided under state constitutional law. Similarly, *D.M.*, in which the Pennsylvania Supreme Court relied on and cited *Jackson*, rests on an identical state constitutional analysis.

In the second case relied upon in *D.M.*, *Commonwealth v. Cook*, 558 Pa. 50, 735 A.2d 673 (1999), where only an Article I, § 8 claim was addressed, the Pennsylvania Supreme Court found that, under its state constitutional analysis, flight was indeed relevant where the police already possessed reasonable suspicion, based on personal observations of suspicious conduct, before the suspect began to flee. *Cook*, 558 Pa. at 60, 735 A.2d at 678. In the case at bar, however, where the anonymous tip of a man "possibly" with a gun could not establish reasonable suspicion, the seizure precipitated and predated the flight, rather than the other way around. What is significant, however, is that, although the Court distinguished the facts in *D.M.* from the facts in *Cook*, the Court employed the same state constitutional analysis to reach its holding in *D.M.*

It is an inescapable conclusion that the Pennsylvania Supreme Court relied on Article I, § 8 to reach its judgment,

and this Court should not undertake to review that state constitutional decision.

B. The Pennsylvania Supreme Court properly held that the police violated Respondent's rights under Article I, § 8 of the Pennsylvania Constitution and the Fourth Amendment by initiating an investigatory stop based on an anonymous tip of a man "possibly with a gun."

Under Pennsylvania state constitutional law, the anonymous tip in this case, which contained only a cursory description of a black male wearing common clothing and "possibly" in possession of a gun, did not and could not provide the police with reasonable suspicion that Respondent was engaged in criminal conduct. *See Commonwealth v. Jackson*, 548 Pa. 484, 698 A.2d 571 (1997); *Commonwealth v. Hawkins*, 547 Pa. 652, 692 A.2d 1068, 1071 (1997); *Commonwealth v. Kue*, 547 Pa. 668, 692 A.2d 1076 (1997). Despite Petitioner's alarmist and disparaging portrayal of the Pennsylvania Supreme Court's analysis as "complaining" or "idiosyncratic", *see* Commonwealth's Petition at pp. 7 and 18, this Court recently adopted precisely the same analysis in *Florida v. J.L.*, No. 98-1993, 2000 U.S. LEXIS 2345 (U.S. March 28, 2000).

Respondent agrees with Petitioner in one respect. In its Petition, the Commonwealth of Pennsylvania stated:

> This same issue was argued before this Court in *Florida v. J.L.*, No. 98-1993 on February 29 of this year and this Court's ruling in *J.L.* will be determinative of this issue. . . .

Commonwealth's Petition at p. 3. On March 28, 2000, this Court, employing an almost identical analysis, held in *J.L.*

that an anonymous tip of a man with a gun does not establish reasonable suspicion.

Consistent with its previous "man with gun" cases, the Pennsylvania Supreme Court properly found in *D.M.* that the cursory, anonymous tip regarding a black male, dressed in a white t-shirt, sneakers, and blue jeans, "possibly" armed, standing on a public street at 6 p.m. on a June evening, and observable by anyone in the neighborhood, *a fortiori* provided no reasonable basis for concluding that criminal activity might be afoot. The Court's decision is also entirely consistent with this Court's unanimous holding in *J.L.*

Moreover, the unique facts of the instant case, centered on an anonymous tip of a man "possibly" with a gun, would extend the "automatic firearm exception" this Court rejected in *J.L.* Obviously, a tip based on conjecture or hunch of a "possible" gun carries even less indicia of factual reliability. In light of the holding in *J.L.*, which Petitioner concedes is controlling, an anonymous tip of a man *possibly* with a gun, the critical fact of this case, is even less compelling a basis for initiating an investigatory detention – or for this Court's discretionary review.

In *D.M.*, one dissenter agreed with the majority that there was no "firearm exception" to *Terry*. The two other dissenters argued that such an exception should be created, but, in light of *J.L.*, this position is no longer tenable, under either state or federal constitutional law. Thus, in its threshold issue, Petitioner is in essence asking this Court to extend a rule of law that this Court has just rejected unanimously, and which a strong majority of the Pennsylvania Supreme Court likewise disapproves.

C. The Pennsylvania Supreme Court properly held that, under Article I, § 8 of the Pennsylvania Constitution and the Fourth Amendment, flight added no legal justification to the police investigation of a suspect where the officers acted on the basis of an anonymous tip of a man "possibly with a gun" and the flight occurred only after the police had initiated a seizure.

Attempting to depict the instant case as controlled by *Illinois v. Wardlow*, ___ U.S. ___, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000), Petitioner misstates the facts by characterizing Respondent's flight as "unprovoked." Commonwealth's Petition at p. 19. This mischaracterization ignores the fact that the Pennsylvania Supreme Court determined that, under Article I, § 8, an unjustified seizure had already occurred prior to the flight.

In *Wardlow*, the police had not yet initiated their investigation when the suspect fled; however, in *D.M.*, the Court held that, under the state constitutional analysis, the officers had already effectuated a seizure, and it was their unjustified conduct that precipitated the flight. This analysis is entirely consistent with the Pennsylvania Supreme Court's prior Article I, § 8 decisions. *See, e.g., Matos, supra; Commonwealth v. Jeffries*, 454 Pa. 320, 325, 311 A.2d 914, 917 (1973) (rejecting argument that flight justified *Terry* stop where no facts "would give rise to the reasonable belief Jeffries was involved in criminal activity").

Nor is *D.M.* incompatible with *Wardlow*. Central to that case were several attendant circumstances, **none of which are present here**: the incident in *Wardlow* took place in an area known for heavy drug trafficking; the officers anticipated encountering a large number of people involved in various facets of the drug trade; and the officers decided to investigate Wardlow, about whom

they had no prior information to make him a particular target, only after he fled from them. *Wardlow*, 120 S. Ct. at 676.

The absence of these additional circumstances readily distinguishes *D.M.* from *Wardlow*: in *D.M.*, there was no evidence that the neighborhood was a high crime area; the officer had no basis for believing that most of the citizens he would likely encounter were involved in criminal activity; and before he fled, Respondent had already been targeted by the police, albeit for a legally insufficient reason, the anonymous tip of a man **possibly** with a gun. Most significantly, however, Respondent's flight was not unprovoked; rather, as the Pennsylvania Supreme Court held under Article I, § 8, it had been precipitated by the officers' authority and their command to Respondent to stop and submit to their investigation, which constituted an illegal detention under Article I, § 8. Even with these attendant circumstances and the anonymous tip of a man "possibly" with a gun, *D.M.* is not inconsistent with *Wardlow*.

Petitioner also misstates the Pennsylvania Supreme Court's consideration of flight as a factor in determining reasonable suspicion by characterizing it as a complete dismissal. Contrary to Petitioner's assertion that the Court held "that flight is not a relevant factor," Commonwealth's Petition at pp. 3-4, the Court simply held, consistent with state constitutional principles governing when a seizure has occurred, that Respondent's "post-seizure" flight was irrelevant because reasonable suspicion could not be bootstrapped by his subsequent flight.

In *D.M.*, the Court held, that, based on the anonymous tip of a man with a gun,

> the officer's suspicions were not aroused at the time he initially approached appellant. As indicated previously, the tip and existing circumstances when Officer Frazier arrived at the scene failed to provide any facts that would lead an officer to reasonably suspect that criminal activity was afoot. In the absence of any factors indicating that the officer suspected criminal activity was afoot, the "additional" factor of flight is not relevant to the determination of reasonable suspicion.

D.M., 743 A.2d at 426. This holding is not the wholesale repudiation of flight's relevance with which Petitioner wishes to alarm this Court. Indeed, the Pennsylvania Supreme Court routinely applies flight as a relevant factor, as it did in one of the two cases it analyzed in *D.M.*, *Commonwealth v. Cook*, which was decided just five months earlier. Thus, Petitioner's misleading characterization of the *D.M.* Court's treatment of flight provides no basis for this Court's review.

CONCLUSION

In the case at bar, the conjectural speculation inherent in an anonymous tip of a man "possibly" with a gun raises no compelling constitutional issues. The Pennsylvania Supreme Court has not decided an important federal question nor done so in a way inconsistent with relevant decisions of this Court. Indeed, the peculiarity of

the instant facts implicates no common occurrence that must be resolved by the exercise of this Court's authority.

Wherefore, for the above argued reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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